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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STAFF SERGEANT WILLIAM COTTRILL,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it held that the evidence supporting petitioner's conviction was legally sufficient.

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The petitioner, Staff Sergeant William Cottrill, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 24 January 1997. Counsel presents this writ at petitioner's request in accordance with the requirements of Article 70 of the UCMJ.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, awaiting publication __MJ__ (24 January 1997), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (A.F. Ct. Crim. App., 26 September 1995), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 24 January 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process clause of the Fifth Amendment of the Constitution of the United States provides in relevant part:

"No person shall... be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

The petitioner and Carmen Cottrill had a child named Charleena (R. 812). In 1990 the marriage of seven years became rocky and Carmen left (R. 813, 1030). In August

1991, the petitioner was awarded custody of Charleena (R. 815, 1031). For a while after their separation, Carmen still provided hygiene care for Charleena during the day. Prior to departing for Arizona with her new husband in April 1992, she stopped doing this (R. 815, 1031). This forced the petitioner to learn to provide hygiene care, *inter alia*, for his daughter (R. 815).

In August, 1991, the petitioner and his daughter took a vacation to his parent's home in Ohio (R. 816). His mother was concerned that the petitioner was not properly washing his daughter's genitals, causing a rash (R. 803, 816). She instructed him on getting rid of the rash, advising him to thoroughly cleanse the vaginal area and apply baby powder to it (R. 803, 804, 817).

In August, 1992, the petitioner and his daughter visited his parents again. Mrs. Cottrill again noted that petitioner was still not properly washing Charleena (R. 804, 805). This time, his mother watched as he bathed his daughter, instructing him to make sure that the pasty film covering her vaginal area was removed to avoid her getting a sore bottom (R. 806). She taught him that he needed to wash inside the lips of the vagina from top to back *(Id.)*. When he returned home he tried to follow his mother's advice and bathed Charleena this way every night, applying powder or Vaseline, to his daughter's vaginal area with his right hand (R. 820, 821).

On 28 Oct 92, while the petitioner was fixing a snack in the kitchen, he heard Charleena start to cry. When he came to her in the living room, she indicated that she had hurt her privates and pointed to a toy (R. 822, Pros. Ex. 13). The petitioner looked at her privates to see what was wrong and he saw what he thought was blood (R. 822). The petitioner took her to the emergency room and had her examined by Dr. Houglum (R. 822, 416). Dr. Houglum found no evidence of trauma and advised them to come back in if there was any

further pain (R. 416).

The next morning, the petitioner took his daughter to the day care provider, Laurie Newsome, and explained to her what had happened (R. 823). The New York Hotline, and Child Protective Services were contacted that same day, 29 October 1992, with an allegation that Charleena was found to have, that day, pain upon urination and bruising to the genital area and may have had some genital bleeding (R. 780, 786). This report was not made by the hospital (R. 416, 785). As a result, Carrie Carpenter, a CPS worker, visited the petitioner on 2 November 1992 and confronted him with allegations that he abused his daughter (R. 774). He denied the allegation (R. 774).

Dr. Hickey was asked by the Family Advocacy Specialist, Dave Richards to perform an examination of Charleena (R. 416). Dr. Hickey is considered the person with the most expertise, at Plattsburgh Air Force Base, in the area of child abuse (R. 410) and is the only doctor "who sits on" the Family Advocacy Committee (R. 457). Dr. Hickey testified that he attended medical school for four years after which he did a pediatric residency at Brown University for 3 years (R. 408). According to his testimony, he had been practicing as a pediatrician a maximum of six years, including his time as a resident, at the time of trial (R. 407). He attended six courses in child sexual abuse since his residency (R. 410). He reported examining hundreds of children who made reports of being molested *(Id.)*. He stays current on the literature in his field "as best he can." *(Id.)*.

On 16 November 1992, SSgt Cottrill was told to bring Charleena to the hospital for a follow-up exam (R. 827). Dr. Hickey had examined Charleena previously three to four times for ordinary childhood problems. (R. 412). Dr. Hickey testified that during that exam he closely examined her genitalia while Charleena was in the frog leg position (R.

419). The results of this fifteen minute exam were normal (R. 419). Dr. Hickey told the members that the hymen—which he defined as the membrane that covers the vaginal opening—was "in tact" or "a complete tissue or membrane" on 16 Nov 92 (R. 423). He testified that the majority of girls Charleena's age have an opening in this membrane and that four to five millimeters is the borderline for it to be enlarged (R. 450). Although some children have a natural opening in this membrane, his examination revealed that Charleena did not (R. 424). The children who do have a natural opening usually have a vertical one (R. 470).

On 8 December 1992, Charleena told her preschool teacher that her privates hurt (R. 401), triggering a second report to the New York Hotline (R. 402). Shortly after the statement was made, Dave Richards at Family Advocacy and OSI were contacted (R. 488). SA Sequeira, AFOSI, contacted the petitioner's First Sergeant, MSgt Auld and told him to "have [the petitioner] come to the hospital" with his daughter (R. 539). Dr. Hickey was called back to duty to reexamine Charleena (R. 425).

At around 1700 hours Dr. Hickey arrived at the hospital and met SA Sequeira, and CPS social workers. They briefed Dr. Hickey on the nature of the allegation (R. 488, 490). He was told that Charleena had made a disclosure at school that her privates hurt and that her daddy had touched her privates (R. 427).

After that briefing, Dr. Hickey led Charleena into a nearby exam room and questioned her (R. 434). When asked why she was there, Charleena said that she hurt (R. 434). When he asked her where she hurt, she responded that her privates hurt *(Id.)*. Dr. Hickey asked her why she hurt and she said that her daddy touches her there (R. 435). He asked her what does daddy touch you with and she answered that daddy touched her with his arms *(Id.)*. When he asked her to show

him, she grabbed her vagina *(Id.)*. Dr. Hickey diligently took notes of the interview with the victim, occasionally interjecting laymen's terms in the medical notes, and later destroying the originals after having rewritten them (R. 459, 471).

The first ten minutes of this fifteen minute exam, Charleena's clothing was still on (R. 458). During the five minutes in which he examined her genitalia, Dr. Hickey didn't notice the presence of labial agglutination. For this exam he used stirrups because they were available in this exam room (R. 437). His exam revealed that the external genitalia had no bruises or lesions, but that there now was a 5 millimeter transverse opening in the hymen (R. 437). Dr. Hickey didn't believe that he could have missed this opening in the prior exam (R. 439). Most children at Charleena's age have an opening in the hymen tissue (R. 450).

Dr. Hickey referred Charleena to Dr. Smith for a colposcopy (R. 440). At trial, Dr. Hickey opined that it would be unlikely that a toy caused the opening in the membrane covering the hymen, since it would be difficult for it to cause an isolated, small change like this. (R. 443). He also confirmed that Charleena suffers from constipation (R. 467).

When Charleena came out from the examination she ran to her dad and was going around in circles with him; she was very happy when he was there (R. 676). When the CPS workers asked SSgt Cottrill to come with them to make arrangements for the child, Charleena didn't want him to go and was wrapping her arms around his leg (R. 676, 677). During his absence she kept asking where he was (R. 676).

Dr. Smith examined Charleena on 10 December 1992 (Pros. Ex. 5). Dr. Smith, a professor at the University of Vermont, and a physician at the University Health Center, testified that she attended medical school and did a residency in obstetrics and gynecology for four years (R. 701). She

practiced obstetrics and gynecology for over ten years prior to date of exam (R. 702). She gives lectures on Child Sexual Abuse, *inter alia* (R. 702). She attended a pediatric gynecological clinic in Boston once a week for five months and attended numerous post-graduate courses and training in pediatric and adolescent gynecology (R. 703).

Dr. Smith defined the hymen as that "rim of tissue around the vaginal opening at it's external end (R. 708). Of the three types of hymens that Dr. Smith described, she surmised that Charleena had an annular hymen—where the hymen tissue is all the way around, even underneath the urethra (R. 708, 709). The child's condition of having an imperforated hymen is common according to Dr. Smith—only 1 in 114 children have no opening in the cover over the hymen (R. 711). Her exam revealed that there was a discontinuity in the ring at three o'clock, three small bumps on the hymenal ring between three and six o'clock, (R. 711) and a narrowing of the ring on the right (R. 712). Dr. Smith stated that she was unable to determine whether the discontinuity was actually a transection (usually caused by a penetrating injury) or a fold (R. 712). Also she stated that since the discontinuity was on the border between being anterior (resulting usually from a non-traumatic event) and being posterior (something not seen in normal children) (R. 712). She testified that the bumps were insignificant as far as an indicator of abuse, since 30% of normal children have bumps on their hymen (R. 714). She could not confirm the narrowing on one side because of the limitation of labial agglutination on the exam (R. 714). However, that too could either be congenital or the result of trauma. Of the three categories of exams, this fell outside of all of them because she could not get an adequate exam of the child's hymen ring (R. 716). Finally, she testified that the evidence is that straddle injuries do not tend to injure the hymen (R. 733).

After Charleena's examination at the base hospital on 8 December 1992, the OSI agents took the petitioner, along with Charleena, dropped her off at a friends house, went through the Burger King drive thru to get dinner, and then went to the OSI office (R. 491, 829). At 1910 hours they were at the OSI building (R. 491, Pros. Ex. 7). Within 12 minutes the OSI began questioning the petitioner about what he had done to his daughter (R. 491, Pros. Ex. 7).

Within one minute of the start of the interview SA Sequeira, the primary interviewer, read the petitioner his rights and the petitioner waived those rights (R. 492). SA Andreini, the assistant interviewer was responsible for taking notes during the interview and was present throughout the interview and typing of the statement (R. 492, 833). All three sat in a small six by eight room, the petitioner with his back against the wall, facing a table separating him from the two OSI agents and exit door (R. 829). After reading the petitioner his rights, OSI discussed the results of Dr. Hickey's exam and talked about how the petitioner bathed his child. The petitioner explained step by step how he bathed his daughter, including the application of baby powder and Vaseline (R. 493). The petitioner denied inserting his finger in Charleena's vagina. He admitted that he touched her privates when he bathed the child and applied the baby powder and Vaseline *(Id.)*. He admitted that occasionally he would get an erection from this and would masturbate after she was asleep (R. 831). He explained that due to a chain saw accident he didn't have much feeling in some of his fingers so he didn't know how much pressure he used in washing his daughter and may have scratched or caught her without knowing it (R. 832, 495). The petitioner was bewildered, confused and tired (R. 833). After over three hours, the petitioner agreed to sign a written statement and the interview ended at 2245 hours (R. 494).

SA Sequeira began typing a statement onto a computer

using his memory and SA Andreini's notes (R. 494, 834). According to SA Sequeira, the petitioner helped them with spelling and grammatical errors (R. 496). SA Sequeira inserted terms in the statement that he determined described what the petitioner had related to him based upon the agent's stint as a medical technician (R. 501). SA Sequeira testified that these terms were discussed with SSgt Cottrill (R. 501). However, SA Andreini does not recall such discussions (R. 159). At 2415 hours, the petitioner signed the statement that his fingers may have hurt Charleena when he put powder on her (R. 504; Pros. Ex. 8).

SA Sequeira testified that both he and SA Andreini were tired that evening (R. 92). During the interview, the petitioner consented to a search of his quarters (R. 504). That search of his quarters began at 0030 and ended at around 0200 hours (R. 505, 836). The only things discovered were a jar of Vaseline, a bottle of baby powder, and three used pale blue tissues or rags (R. 507–509; Pros Ex. 15, 16, 17). After the search, the petitioner tried but wasn't able to get much sleep because he was too upset (R. 837). He was awake at 0430 hours and was at work at about 0630 hours *(Id.)*

On 9 Dec 92, at lunch time, OSI directed MSgt Auld to bring the petitioner to their office (R. 674). He drove SSgt Cottrill to the OSI building (R. 838). He noted that SSgt Cottrill appeared tired (R. 675). At OSI, SSgt Cottrill was met by SA Sequeira. The petitioner told SA Sequeira that he hadn't had much sleep and was tired (R. 838). SA Sequeira responded that he "didn't get much sleep either" because he was up doing paperwork last night (R. 838). SA Sequeira had returned to the detachment after the search the prior evening and taken care of the seized evidence (R. 510).

The petitioner was led into the same room as before, this time without the table (R. 838). He was joined by SA Sequeira and Officer Larry Bliss, of the New York State

Police *(Id.)*. SA Sequeira had called Officer Bliss the previous evening to request his assistance (R. 838, 510).

Both SA Sequeira and Officer Bliss read the petitioner his rights. Officer Bliss was the primary questioner and SA Sequeira took notes (R. 512, 838). Officer Bliss was seated such that his knees touched SSgt Cottrill's and during the interview he periodically placed his hand on SSgt Cottrill's shoulder (R. 838, 514). SSgt Cottrill testified that Officer Bliss told him that the only thing that kept him from running SSgt Cottrill downtown was that it looked like he was cooperating, and if he stopped cooperating, then he would go downtown to jail and they would probably kill him there because of the nature of the charges (R. 838). Officer Bliss' tone was stern, firm, and authoritative (R. 543, 839). Officer Bliss testified that he didn't recall SSgt Cottrill telling him that he stopped bathing his child, or that he didn't know why he had done that (R. 591). These statements however, appeared on the final written AF Form 1168. Until the end of the interview the petitioner consistently denied inserting his finger in his daughter's vagina (R. 514). At the end of the interview, he admitted to his finger slipping in once and thereafter inserting his finger into her vagina on different occasions, until a couple weeks prior to the interview (R. 514, Pros. Ex. 11). Bliss left at the end of the interview, 1435 hours, without receiving any interview notes or statements. SA Sequeira typed a statement which SSgt Cottrill later signed (R. 515, 517). After signing the statement, MSgt Auld took the petitioner to see Lt. Col. Ward, Family Advocacy Officer (R. 842). At that time, the petitioner appeared sad, unhappy, and discouraged (R. 602). MSgt Auld told Lt. Col. Ward that there were Child Sexual Abuse allegations against SSgt Cottrill (R. 594). SSgt Cottrill told Lt. Col. Ward that he touched Charleena's privates to bathe her, but he didn't think he had done anything wrong (R. 595).

The next day, SSgt Cottrill called Lt. Col. Ward inquiring on the status of the investigation (R. 603). Lt. Col. Ward explained that these things take a while *(Id.)*. On 11 December 1992 SSgt Cottrill went to Lt. Col. Ward's office and said that he couldn't remember what he had said to Lt. Col. Ward or OSI on 9 Dec 92 *(Id.)*.

In sentencing, Charleena's mother, Carmen Sanders, said that after Charleena had heart surgery on 21 Mar 93 to correct a condition she was born with, she recovered very well (R. 1036). Charleena returned to preschool, which runs three days a week from 0800 to 1200 hours, and completed it for the year (R. 1037, 1038). Charleena went to a counselor for the sexual abuse, who didn't diagnose any problems, but determined that Charleena would be easy to work with since she was very outgoing and was playing with everything in the room (R. 1038). Ms. Sanders testified that Charleena plays and swims a lot and has never shown any behavioral signs of sexual molestation (R. 1042). She gets along well with her new stepfather (R. 1039). Carmen wanted Charleena and her father to be together because Charleena loves her daddy deeply (R. 1038).

On 21–28 July 1993, the petitioner was tried by a general court-martial of two specifications of indecent acts upon a minor. The court-martial convicted him of one specification for committing indecent acts upon his minor daughter between 31 August 1991 and 1 January 1993. The approved sentence was a dishonorable discharge, confinement for six years, and reduction to airman basic. The Air Force Court of Criminal Appeals affirmed the findings as correct in law and fact, but found that the sentence was inappropriately severe. The Court reduced the sentence to four years. The U.S. Court of Appeals for the Armed Forces held that the evidence and the confession were sufficient to support conviction as a matter of law.

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT HELD THAT THE EVIDENCE SUPPORTING PETITIONER'S CONVICTION WAS LEGALLY SUFFICIENT.

The test for legal sufficiency is whether the evidence, viewed in the light most favorable to the prosecution, is such that a reasonable fact finder could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Harper,* 22 M.J. 157, 161 (C.M.A. 1986); *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987). Mere suspicion that something improper must have happened, with no direct or circumstantial evidence establishing what happened, is not sufficient. *United States v. Cage,* 42 M.J. 139, 144 (1995), *citing, United States v. Peterson*, 3 C.M.R. 51, 54 (C.M.A. 1952).

To support the petitioner's conviction of the charged indecent acts to a minor, the government had the burden to prove the following elements: (1) the accused, on diverse occasions between on or about 31 August 1992 and on or about 1 January 1993, rubbed Charleena Cottrill's vaginal area and placed his finger inside her vagina; (2) Charleena was under the age of 16 at the time and not the petitioner's spouse; (3) these acts were indecent; (4) the petitioner committed the acts with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused; and (5) the conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. Article 134, ¶87. (UCMJ, MCM 1984).

The government's case consisted of six witnesses and twenty one exhibits. The six witnesses were a day care provider, two OSI agents, a New York State police detective, a pediatrician, and the family advocacy officer. Ms.

Kulaszewski, the day care provider, testified that on 8 Dec 92 Charleena said that her privates hurt. (R. 401). Dr. Hickey, the examining pediatrician, testified as to the opening in the membrane covering the vagina (R. 406–480), and Charleena's statement, in response to his questions, that her privates hurt because her father touches her there with his arms (R. 435). The two OSI agents, SA Sequeira and SA Andreini, testified about the petitioner's interviews and the search of the petitioner's quarters (R. 485–567; R. 567–578). The NYSP detective Bliss testified as to his interview of the petitioner (R. 579–592). Lt. Col. Ward, the Family Advocacy Officer, testified about his conversation with petitioner after the second visit to OSI (R. 593–617).

The exhibits presented by the government consisted of medical notes from four exams of Charleena (Pros Ex. 1–3, 5), a picture of the victim (Pros. Ex. 4), notes and interview records from OSI (Pros Ex. 6, 7, 9, 10), a diagram of the female genitalia (Pros Ex. 12), a toy (Pros Ex. 13), dirty rags and tissues (Pros Ex. 15), baby powder and Vaseline (Pros Ex. 16, 17), and family advocacy and child protective services notes (Pros. Ex. 19, 20, 21). Finally, the government presented the original and a copy of the petitioner's confessions (Pros. Ex. 8, 11, 14, 18).

The petitioner's confessions were the sole evidence that the petitioner rubbed the daughter's vagina and inserted his finger in her vagina. In fact, the members acquitted the petitioner of the other charge against him; that charge was not supported by the confession. The petitioner made two statements to OSI when they brought him into their office. The first statement, on 8 December 1992, in summary admitted to his touching his daughter's vaginal area in the process of bathing her, because it made her feel good and relaxed her. He denied ever placing his finger inside her vagina. In the second statement, made the following day, the

petitioner stated that his finger slipped into his daughter's vagina while bathing her in September 1992 and that thereafter he put his finger in her vagina for 10–15 seconds, without rotating it, and she said it made her feel good. In that second statement he admitted to getting an erection from this and masturbating out of the presence of the child. He stated that he stopped touching her privates two weeks prior to the statement.

Assuming the reliability of the confessions, the key question here is what evidence proves that the petitioner's rubbing his daughter's vagina and inserting his finger in her vagina, during bathing, was done with the intent to gratify his lust or sexual desires. *United States v. Hoggard,* 43 M.J. 1 (1995). The medical testimony presented at trial was inconclusive as to what occurred and so does not support any inference as to intent. The statements of the daughter were ambiguous and consistent with the theory purported by the defense, that is, that the petitioner touched her privates to bathe her. The pretrial statements of the petitioner do not expressly state that he touched his daughter's privates with the intent to gratify his sexual desires. Thus, the only evidence that the petitioner intended, at the time of the act, to gratify his sexual desires had to be derived circumstantially. That is, the fact finder would have to have drawn an inference from pretrial statements based upon the petitioner's state of mind subsequent to the act, represented by his statement that he got erections when doing this and later masturbated out of the child's presence (Pros. Ex. 14, 18). From this, the fact finder had to deduce that the petitioner's actions were designed or intended to achieve this result. Without more this inference is tenuous. Applying this inference to the act of rubbing her vagina with powder, is even more flimsy.

An equally reasonable inference could be drawn from the evidence that the petitioner was simply bathing the child, as

he said, because he had no choice as the sole custodian. The record presents evidence that this was a father with little experience, who was thrust into the position of full custody of his child after the wife deserted them. He attempted to bathe her privates the way his mother recommended since she had indicated his failure in this area was causing the child discomfort. His mother instructed him, on at least two occasions, that he needed to wash her better in her privates. The proof supported the proposition forwarded by the petitioner that he rubbed powder or Vaseline on her vaginal area after bathing her (Pros Ex 13 & 14). When he put powder on her and cared for her in this area he had to some extent to rely upon what made the child feel comfortable. He found that this did make the child feel good and relaxed her.

Drawing the inference that the petitioner intended to gratify his sexual desires by doing these acts is not reasonable. So, even assuming the reliability of the confessions, the conviction fails for lack of evidence on the element of intent.

However, any reasonable trier of fact would not have attached much weight to these confessions. "...it is for the trier of fact to determine whether the evidence as a whole is sufficient to establish all elements of the offenses beyond a reasonable doubt." *United States v. Yates,* 24 M.J. 114, 117 (C.M.A.), *cert. denied,* 484 U.S. 852 (1987). R.C.M. 304(g) provides that the amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession. The question as to the level of corroboration of the confession remains a factor in assessing the weight a reasonable fact finder could assign to the admissions made by the petitioner. *See, United States v. Duvall,* 44 M.J. 501, 506 (A.F.Ct.Crim.App. 1996)(J. Pearson, dissenting). The members were instructed that the nature of corroborating

evidence was to be considered in determining the weight to be given to the pretrial statements (R. 1008). Additionally, the government counsel argued that "the law requires that a confession be corroborated" (R. 977).

Although the military judge is responsible to decide the preliminary question of whether the confessions were adequately corroborated, the members are still faced with the question of the appropriate weight to attach to the confessions. *See, Duvall, Id.* Herein, a reasonable factfinder could not have attached great weight to these confessions for the following reasons.

First, the issue of whether the statements were voluntarily made was hotly contested during pretrial motions and the case in chief. This fact goes against drawing an inference as to the truthfulness of these confessions. *Cf, United States v. Maio,* 34 M.J. 215 (C.M.A. 1992); *United States v. Martindale,* 30 M.J. 172 (C.M.A.), *rev'd on other grounds,* 32 M.J. 33 (1990); *United States v. Melvin,* 26 M.J. 145 (C.M.A. 1988); *United States v. Yates,* 24 M.J. 114 (C.M.A. 1987); *United States v. Yoeman,* 25 M.J. 1 (C.M.A. 1987).

The Supreme Court stated in *Smith v. United States,* 348 U.S. 147, 153, 75 S.Ct. 194, 197, 99 L.Ed.192 (1954):

> "Though a statement may not be 'involuntary' within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made. . . . These are the considerations which

> justify a restriction on the power of the jury to convict, for this experience with confessions is not shared by the average juror."

The facts suggesting that the petitioner had succumbed to the pressures of the interrogations are set forth below. SA Sequeira testified that the first interview began after the petitioner's daughter had been taken away, at about 1900 and lasted until midnight (R. 494). The petitioner appeared nervous (R. 495). SA Sequeira was tired (R. 541). OSI did not leave the petitioner's house on the 8th of December until 0200 hours (R. 505). His First Sergeant testified that the petitioner stated that he was tired and appeared tired on the trip to OSI, the following day, 9 Dec 92 (R. 675). That day, Detective Bliss conducted this second interview of the petitioner (R. 581). He had a firm, authoritative and stern voice (R. 543). The petitioner did not admit to putting his finger inside his daughter until the end of this interview (R. 591). Immediately after the interview, the petitioner told Lt. Col. Ward that he didn't understand what he had done wrong and told him that he touched his daughter's privates in the process of bathing her (R. 595).

No evidence suggested that the petitioner had any previous experience with law enforcement officials. The evidence suggests that the petitioner was upset, confused, and legitimately tired (R. 675, 838). Even the OSI agents were tired during their interviews (R. 92, 510, 838). A review of SSgt Cottrill's performance reports demonstrates that he is not of superior or especially quick intellect. Rather he is one who constantly struggles to understand and improve (Pros Ex. 23). Moreover it is well established in the record that the petitioner's daughter was very important to him. It is consistent with this evidence that the petitioner, who learned to survive in the military by complying with orders and trying to please his superiors, would follow suit with the government

officials conducting the interviews which he was escorted to by his First Sergeant. It is consistent that the petitioner believed that if he did the best that he could to please his interviewers, he would succeed in getting his daughter back and ending this nightmare. The interviewers were skilled enough to pick up on this and use tactics designed to gain the confidence of the person (R. 586) and thereby induce them to make incriminating statements. It was clear that the petitioner was a weak minded person who was prone to follow orders and was already upset by the status of his daughter.

Second, the facts in the confessions conflict. Only one of the confessions can legitimately be believed. The question is, which one. If the trier of fact finds that the petitioner is lying as to some of the information in the confessions, then the reliability of the other statements is brought into question. It is insufficient for the fact finder to conclude that because the petitioner was untruthful in his statements he committed the crimes. Moreover, the petitioner testified on the stand, on direct exam and under a grueling cross-examination, that he did not insert his finger in his daughter's vagina, and only rubbed her vagina in order to bathe her (R. 811–970)

Third, the fact that there was little if any corroboration of the essential facts of the confessions tips the scales substantially in favor of the petitioner. *See, argument below.*

Admissions and confessions, when voluntarily and freely made, have always ranked high on the scale of incriminating evidence. *Brown v. Walker,* 161 U.S. 591 (1896). When corroborated they have the highest reliability and significantly contribute to the certitude with which we may believe the accused's guilt. *Miranda v. Arizona,* 384 U.S. 436, 538 (1966).

Because the corroboration issue was not expressly raised at trial, and is raised at this point for the first time on appeal, arguably, a plain error standard of review could be applied.

Mil.R.Evid. 103. However, in *United States v. Melvin,* 26 M.J. 145 (C.M.A. 1988), this Court declined to decide the issue on the basis of waiver, though justified in doing so. In this case, the Court should not decide this case on the basis of waiver.

Even if this Court applies a plain error analysis, the standard is met here where the admission of these confessions, which lacked even slight corroborating evidence, was both obvious and substantial error. Generally a confession is corroborated when independent evidence supports its truthfulness or reliability. *United States v. Melvin,* 26 M.J. 145 (C.M.A. 1988). Although there is no mathematical formula to measure sufficient corroboration for admission of confessions, the CANF had previously looked at the following factors: voluntariness, vagueness, and how well the independent evidence dovetails with the statements in the confession. *See, Melvin, Id.; United States v. Rounds,* 30 M.J. 76 (C.M.A.), *cert. denied,* 498 U.S. 846 (1990); *United States v. Maio,* 34 M.J. 215 (C.M.A. 1992). The amount of corroboration needed in the military is very slight. *Melvin, supra.*

As noted above, there remains some doubt as to the voluntariness of this confession and concomitantly its reliability.

In contrast with a confession replete with detail, where there exists a generous opportunity for corroboration, the confessions here are general in nature. That makes them more difficult to corroborate. *See, Rounds,* 30 M.J. 76 (C.M.A. 1990)(J, Everett, concurring in part). In his opinion, Judge Everett contrasts the case in *Rounds* with the example of corroboration given in the analysis to Mil.R.Evid. 304(g). The drafters' hypothetical being as follows:

> [P]resume that an accused charged with premeditated murder has voluntarily confessed that, intending to kill the alleged victim, she concealed

> herself so that she might surprise the victim at a certain place and that when the victim passed by, she plunged a knife in his back. At trial, the prosecution introduces independent evidence that the victim was found dead as a result of a knife wound in his back at the place where, according to the confession, the incident occurred. This fact would corroborate the confession because it would support an inference of the truth of the essential facts admitted in the confession.

Drafters' Analysis, MCM (UCMJ 1984) at A22–13. Judge Everett opines that in that example, the prosecution's opportunity for corroborating the confession is ample due to the detail of the confession: identity of the victim, instrument used to kill him, locus of the fatal wound, and place where the murder occurred. *Rounds,* 30 M.J. at 84.

In this case, as in *Rounds,* the prosecutor was not so fortunate. Here the statement was vague as to the petitioner's intent and purpose in doing the acts. The petitioner steadfastly held to the fact that this was done in the process of bathing and caring for the child, rather than as a means to excite him sexually. Further, it was not until the end of the second interview that the petitioner suggested that he inserted his finger into her vagina and got an erection. There is no independent evidence corroborating this act or his intent to gratify the petitioner's sexual desires.

What few details were stated in the confessions fail to dovetail with the other evidence presented at trial. The medical evidence was ambiguous and therefore provided no corroboration. The results of Dr. Smith's examination were normal. The child's statements that her dad touches her in her vaginal area provide no support for the proposition that the petitioner sexually abused his child for his sexual pleasure by placing his finger inside her vagina. She stated only that her

dad touched her privates. She demonstrated by taking her whole hand and grabbing her vaginal area. She did not take her finger to make this gesture. Her demonstration of how her father touched her does no more than confirm that he washed her. Thus, even under the low standard for corroborating evidence, this evidence provided no independent corroboration of the confessions. Admitting the confessions was an obvious and substantial error.

Without the confessions, the evidence is woefully inadequate to support the conviction. The fact finder is left with evidence of the daughter's statements and medical evidence.

The medical evidence is inconclusive. Clearly, the more credible testimony on the matter of the medical examination was that of Dr. Smith. She was more qualified than Dr. Hickey and had the opportunity to do a more thorough examination using magnification that Dr. Hickey simply did not have. In fact, that was the basis for Dr. Hickey referring Charleena to Dr. Smith (R. 440). Further, she was more familiar with recent developments in this area being an instructor on the post graduate level. Her conclusion was that this examination was indeterminate, that is, it could not be defined as normal or abnormal due to the inability to more closely examine. It neither confirmed nor dispelled the allegations of abuse.

The statements made by the victim were inconclusive. Notably, Charleena, dic not testify at any point in the pretrial or trial proceedings. The only evidence we heard from Charleena was through the testimony of the child care provider, Ms. Kulaszewski, and Dr. Hickey. Ms Kulaszewski testified that the child told her that her privates hurt on 8 Dec 92 (R. 401). Dr. Hickey testified that the child told him that her privates hurt because her father touches her with his arms (R. 435). These statements suggest only that the child's privates were hurting and that her father touches her privates.

This is consistent with his having washed her privates as instructed by his mother and that this washing was the cause of the pain.

Without the petitioner's statements there would be no evidence as to his intent or as to the indecency element. The indecency element is only satisfied by the evidence in the confession that indicates that he placed his finger into his daughter's vagina. Had there been no confession, and considering all the circumstances surrounding the alleged act the evidence remaining would clearly have been insufficient to sustain the conviction. *See, United States v. Choate,* 32 M.J. 423 (C.M.A. 1991).

CONCLUSION

The evidence is insufficient to sustain petitioner's conviction of indecent acts upon his daughter, since a rational fact finder could not have found the elements of intent. The fact that a rational fact finder could not have attached much weight to the confessions—due to their lack of corroboration and involuntariness—furthers the problems with the government's evidence. Even applying a plain error analysis the error of allowing the confessions to come in without adequate corroboration was obvious and substantial. Clearly, without the petitioner's pretrial statements the prosecutions case fails.

MARGE A. OVERLY, Capt, USAF
Counsel of Record
Appellate Defense Counsel
Air Force Legal Services Agency
United States Air Force
202-767-1562

APPENDIX A

UNITED STATES, Appellee

v.

William O. COTTRILL, Staff Sergeant
U.S. Air Force, Appellant

No. 96–0138
Crim. App. No. 30951

United States Court of Appeals for the Armed Forces

Argued October 3, 1996
Decided 24 Jan. 1997

Counsel

For Appellant: *Captain Marge A. Overly* (argued); *Colonel Jay L. Cohen* (on brief); *Major Ormond R. Fodrea.*

For Appellee: *Captain Mitchel Neurock* (argued); *Lieutenant Colonel Michael J. Breslin* and *Major Allen G. Erickson* (on brief); *Colonel Theodore J. Fink.*

Military Judge: William S. Colwell

Opinion of the Court

SULLIVAN, Judge:

During July of 1993, appellant was tried by a general court-martial composed of officer members at Plattsburgh Air Force Base, New York. Contrary to his pleas, he was found guilty of committing indecent acts with his 3 1/2-year-old daughter in violation of Article 134, UCMJ, 10 USC § 934. He was sentenced to a dishonorable discharge, confinement for 6 years, and reduction to E-1. The Court of Criminal Appeals reduced his sentence to a bad-conduct discharge, confinement

for 4 years, and reduction to E-1. *United States v. Cottrill*, CCA 30951 (A.F. Ct. Crim. App. 26 September 1995) (unpub.).

This Court specified the following issue for review:

> WHETHER THE EVIDENCE IS SUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE FINDINGS OF GUILTY AND/OR APPELLANT'S CONFESSION.

We hold that the evidence in this case is sufficient as a matter of law to sustain the admission of appellant's confession and the findings of guilty. *See United States v. Sever*, 39 MJ 1 (CMA 1994)(kissing child can be indecent assault depending upon surrounding circumstances).

The Court of Criminal Appeals summarized the facts of this case as follows:

> Appellant was a single parent caring for his young daughter, CC. One day CC told her preschool teacher that "her privates hurt" and a joint military and civilian investigation followed. During a subsequent medical examination, CC also told Doctor Hickey that "her privates hurt." In response to his questions, she indicated that her daddy touched her there with his arms. The medical examination was inconclusive, although the findings were different from a prior pelvic examination conducted three weeks earlier. Over the course of two interviews with Air Force Office of Special Investigations (AFOSI) agents, appellant admitted to bathing his daughter, washing her genital area, powdering her, and to placing his finger in her. However at trial he challenged the admissibility of these statements and claimed that he hadn't done anything wrong.
>
> .Unpub. op. at 2.

A review of the record reveals that, in his first statement, appellant admitted to touching his daughter's vaginal area in the process of bathing and powdering her. He asserted that his daughter enjoyed when he powdered her private area. He denied deliberately putting his finger into her vagina, but he admitted that he may have accidentally snagged or scratched her. He also admitted that, on occasion, he experienced an erection after rubbing powder on her private area.

In his second statement, made the following day, appellant admitted putting his finger into his daughter's vagina for ten to fifteen seconds and he stated that he "got sexually excited and an erection most of the time when I have my finger in her." Appellant admitted that he would "wait until after she [was] asleep and masturbate." Appellant stated, "I never masturbated in front of my daughter. She never knew that I got any excitement out of doing this to her." Appellant admitted that he "knew it was wrong to touch her," and that "it had to stop." Appellant finally admitted to touching his "daughter's private once every couple of weeks at most."

Appellant's initial claim on this appeal is that his conviction for committing indecent acts with a child was not based on legally sufficient evidence. *See generally United States v. Hoggard,* 43 MJ 1 (1995). He argues that his purported confessions on December 8 and 9, 1992, do not establish all the elements of that crime. In particular, he asserts that neither of his pretrial statements to military police established that his acts were indecent or that they were done with an intent to gratify his sexual desires. Instead, he contends that the evidence in this case shows only that he rubbed his daughter's vagina and inserted his finger therein as part of her normal bathing process. We disagree.

Legal sufficiency is tested for whether, considering the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Garner,* 43 MJ 435, 437 (1996); *United States v. Turner,* 25 MJ 324 (CMA 1987). Appellant was found guilty of committing indecent acts with his 3 1/2 year old daughter in violation of Article 134. The specification states,

> In that [appellant] did, within the territorial limits of the State of New York, on divers occasions between on or about 31 August 1992 and on or about 1 January 1993, commit indecent acts upon the body of [CC], a female under 16 years of age, not the wife of the said [appellant] by rubbing her vaginal area, and by placing his finger inside her vagina, with intent to arouse and gratify the lust and sexual desires of the said [appellant].

In his first statement, appellant did state that he touched his daughter's vaginal area while bathing her. However, he further indicated that he generally touched his daughter in her vaginal area to make her feel good and to relax her. In his second statement, appellant admitted that he deliberately penetrated her vagina with his finger, and he stated that she said she enjoyed it. Finally, appellant acknowledged that he was sexually aroused by these touchings to the point of masturbation. Clearly, appellant on appeal is not free to ignore unfavorable parts of his pretrial statements in arguing legal insufficiency. *See generally United States v. Williams,* 21 MJ 360, 364 (CMA 1986) .

More particularly, the thrust of appellant's argument is that it was unreasonable for a factfinder to find his conduct indecent under the circumstances of his case as he describes them. *See United States v. Hoggard, supra.* Indecency for purposes of this offense is generally understood to mean "that form of immorality relating to sexual impurity which is not

only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." *See* para. 90c, Part IV, Manual for Courts-Martial, United States, 1984. In finding this element of the offense in a particular case, this Court has repeatedly held that the factfinder must consider *all the circumstances* surrounding the act, not just those favorable to an accused. *See United States v. Tindoll,* 16 USCMA 194, 195, 36 CMR 350, 351 (1966); *see generally United States v. Holland,* 12 USCMA 444, 445, 31 CMR 30, 31 (1961) ("Under some circumstances a particular act may be entirely innocent; under other conditions, the same act constitutes a violation of the Uniform Code.").

In this light, appellant's claim of appropriate parental conduct must fail. The record before us established that an adult male repeatedly touched a 3 1/2 year old girl around and in her vagina to the point of physical pain. Evidence that these vaginal touchings and penetrations were performed by her father during the bathing process does not diminish the obvious depravity of such sexual abuse. Moreover, evidence of the child victim's purported enjoyment of the powdering or the vaginal penetrations by her father does not make it any less outrageous or repugnant to common propriety. Finally, appellant admitted that these acts excited his lust to the point of masturbation at a later time and place. In our view, a reasonable factfinder could conclude that appellant's actions were indecent under all the circumstances of this case. *See United States v. Tindoll, supra.*

Appellant also contends that his pretrial statements do not establish that he touched his daughter with an intent to gratify his sexual desires, and that there was no other evidence of this specific intent. *See* pare. 87b(1)(d), Part IV, Manual, *supra.* Admittedly, appellant did not expressly state in his pretrial statements that he had such a sexual intent.

However, direct evidence of sexual intent is not required for conviction of indecent acts with a child, and ample circumstantial evidence of such an intent did exist in this case. *See generally United States v. Sakaye,* 11 USCMA 680, 681, 29 CMR 496, 497 (1960). Most strikingly, appellant admitted sexual arousal and excitement when powdering his daughter and inserting his finger into her vagina. He also admitted to masturbating after these touchings but not in her presence. Such evidence circumstantially showed that appellant touched his daughter with an intent to gratify his sexual desires. *See United States v. Sever, supra; United States v. Sanchez,* 11 USCMA 216, 219, 29 CMR 32, 35 (1960).

Perhaps sensing the inherent weakness of his initial arguments in this case, appellant adopts an alternative approach to the legal insufficiency question. He notes that his conviction, if sustainable at all, was largely dependent on his pretrial statements. He alternatively contends that these pretrial statements to law enforcement agents were inadmissible because they were involuntary and lacked sufficient corroboration. *See* Mil.R.Evid. 304(a) and (g), Manual, *supra.* Accordingly, on this basis he persists in his claim that his conviction for indecent acts was based on legally insufficient evidence.

The voluntariness of a confession depends on "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *United States v. Martinez,* 38 MJ 82, 86 (CMA 1993), citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 226 (1973); *accord Arizona v. Fulminate,* 499 U.S. 279, 285 (1991). The Government must prove voluntariness by a preponderance of the evidence. *United States v. Martinez, supra* at 87. Voluntariness of a confession is ultimately a legal question, *see Miller v. Fenton,* 474 U.S. 104, 110 (1985), and this Court owes no deference to the appellate court below or the military

judge in deciding this question. *United States v. Martinez, supra* at 86; *Mincey v. Arizona,* 437 U.S. 385, 398 (1978).

The military judge's special findings of fact, unless clearly erroneous, are the basis upon which we rely to determine the voluntariness of an accused's confession. See *United States v. Martinez, supra* at 86 ("[M]ilitary judge's detailed findings . . . surely do offer support to a legal conclusion of involuntariness."); *Id.* at 87 (Sullivan, C.J., concurring) ("[M]ilitary judge's factual conclusion . . . is deserving of great weight in the voluntariness analysis."). The military judge here found as fact that appellant was read his rights; he waived them on an Air Force Form 1168; he was not threatened by law enforcement officials; he was cooperative during the interview; he swore to an oath that the statement was voluntary and truthful; he made several pen and ink changes to the statement; and then signed it.

Admittedly, there was also evidence in the record that he was tired and distraught about his daughter during the two interviews by law enforcement agents; that his interrogators acted in an authoritative manner and that he was a "weak minded person." Such evidence, however, does not dictate a conclusion that appellant's confession was involuntary. *See United States v. Robinson,* 26 MJ 361, 366–67 (CMA 1988)(appellant's "weak character" did not make confession involuntary). Moreover, the record as a whole does not support a finding that appellant was so tired that his will was overborne. *See Boggs v. Bair,* 892 F.2d 1193, 1199 (4th Cir. 1989)(record supported finding that defendant was not "so intoxicated that his will was overborne"). Finally, we are persuaded that the interrogators' manner, appellant's concern for his daughter, and his subservient personality did not lead him to falsely incriminate himself. *See Colorado v. Connelly,* 479 U.S. 157 (1988); *United States v. Morgan,* 40 MJ 389, 394 (CMA 1994); *cf. Mincey v. Arizona, supra.*

Appellant's second argument in support of the inadmissibility of his pretrial statements is that they lacked sufficient corroboration, and therefore, that the military judge erred in admitting them into evidence. He asserts that his admission that he inserted his finger into his daughter's vagina with an evil intent was not shown by other evidence to be trustworthy. In making this argument, he relies on our case law and Mil.R.Evid. 304(g). The latter states:

> An admission or a confession of the accused may be considered as evidence against the accused . . . only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth.

The corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even the *corpus delicti* of the confessed offense. *See United States v. Maio,* 34 MJ 215, 218 (CMA 1992). Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted. *Id.; United States v. Rounds,* 30 MJ 76, 80 (CMA 1990). Moreover, while the reliability of the essential facts must be established, it need not be done so beyond a reasonable doubt or by a preponderance of the evidence. *United States v. Maio, supra* at 218 n.1; *see United States v. Melvin,* 26 MJ 145, 146 (CMA 1988) (quantum of corroboration needed "very slight"); *United States v. Yeoman,* 25 MJ 1, 4 (1987)(corroboration needed "slight"). This low standard notwithstanding, we closely analyze the evidence in every case before us to determine whether a confession has been sufficiently corroborated. *See United States v. Rounds, supra* at 218–19; *see generally* C.A. Wright, *Federal Practice and Procedure* § 414 (1982) .

In the *case sub judice,* appellant expressly admitted that he inserted his finger into his daughter's vagina for 10–15 seconds on several occasions under circumstances indicating he derived sexual gratification from these acts. The trustworthiness of his admissions to these acts of sexual abuse was supported by other evidence in the record. First, Doctor Hickey testified that during a medical examination of appellant's daughter (CC), the young girl said her 'iprivates" hurt. That same doctor also testified that CC then said, "[M]y Daddy touches my privates," as the reason why she hurt. Finally, Doctor Hickey testified that after multiple examinations of CC, there appeared to be an unnatural opening in CC's hymen, and it was his opinion that it was caused by sexual abuse. This evidence tends to show that sexual injury was inflicted on appellant's daughter and supports appellant's pretrial admissions to the acts causing such injury. *See United States v. Snearley,* 15 USCMA 462, 465–66, 35 CMR 434, 437–38 (1965).

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges CRAWFORD, GIERKE, and EFFRON concur.

APPENDIX B

UNITED STATES

v.

Staff Sergeant William O. COTTRILL
FR290–60–7573

United States Air Force Court of Criminal Appeals
ACM 30951

26 September 1995

Synoposis

Sentence adjudged 28 July 1993 by GCM convened at Plattsburg Air Force Base, New York.

Military Judge: William S. Colwell.

Attorneys

Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E–l.

Appellate Counsel for Appellant: Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, Captain Robert I. Smith, and Captain Marge A. Overly.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise and Major Jules D. Silberberg.

Judge

Before DIXON, SCHREIER, and STARR Appellate Military Judges

OPINION OF THE COURT

Text of the decision

SCHREIER, Judge:

Contrary to his pleas, members convicted appellant of divers incidents of indecent acts with his 3 1/2-year-old natural daughter. They acquitted him of a single indecent act with another 12-year-old female. Article 134, UCMJ, 10 U.S.C. Sec. 934 (1988). Members sentenced appellant to a dishonorable discharge, confinement for 6 years, and reduction to E–1. Appellant now asserts six errors concerning the admissibility of his statements, the victim's hearsay statements to the doctor, and other background information, the appropriateness of trial counsel's arguments, factual and legal sufficiency of the findings, and sentence severity. We find that the sentence is inappropriately severe and reassess. Otherwise, we find no prejudicial error.

FACTS

Appellant was a single parent caring for his young daughter, CC. One day CC told her preschool teacher that "her privates hurt" and a joint military and civilian investigation followed. During a subsequent medical examination, CC also told Doctor Hickey that "her privates hurt." In response to his questions, she indicated that her daddy touched her there with his arms. The medical examination was inconclusive, although the findings were different from a prior pelvic examination conducted three weeks earlier. Over the course of two interviews with Air Force Office of Special Investigations (AFOSI) agents, appellant admitted to bathing his daughter, washing her genital area, powdering her, and to placing his finger in her. However at trial he challenged the admissibility of these statements and claimed that he hadn't done anything wrong.

MEDICAL EXCEPTION TO THE HEARSAY RULE

Appellant alleges that CC's statements to Dr. Hickey that her daddy touched her are inadmissible because Dr. Hickey was acting as part of the law enforcement team and was not evaluating CC for treatment purposes. Appellant further alleges that his Sixth Amendment confrontation rights were violated because CC did not testify at trial.

Statements made for purposes of medical diagnosis or treatment are admissible as an exception to the hearsay rules. Mil.R.Evid. 803(4). The declarant must have an expectation that being truthful will help and that making the statement is for the purpose of diagnosis or treatment. United States v. Armstrong, 36 M.J. 311, 313 (C.M.A. 1993); United States v. Siroky, 42 M.J. 707 (AF Ct. Crim. App. 1995) (en bane). When the declarant is a child, courts have applied a relaxed rule in determining whether the child had the necessary expectation that being truthful will help the child feel better. United States v. Avila, 27 M.J. 62 (C.M.A. 1988); United States v. Lingle, 27 M.J. 704 (A.F.C.M.R. 1988), pet. denied, 28 M.J. 455 (C.M.A. 1989). Additionally, while the declarant need not make a formal declaration that the statements are made for medical purposes, there must be some evidence to support that inference. United States v. Ureta, 41 M.J. 571, 576 (AF Ct. Crim. App. 1994). We evaluate the military judge's decision to admit hearsay testimony under an abuse of discretion standard. United States v. Dorsey, 38 M.J. 244, 246 (C.M.A. 1993).

Dr. Hickey had previously examined CC approximately 6 or 7 times for either routine examinations or minor illnesses, as well as monitoring her congenital heart problems. CC complained to both her preschool teacher and Dr. Hickey that "her privates hurt." It is reasonable to believe that she made these statements in an effort to seek help in feeling better. Thus, the expectation prong of Armstrong is met. Compare Siroky, 42 M.J. at 714.

Appellant further argues that the medical diagnosis prong was not met because Dr. Hickey was acting as a government agent. Appellant claims that the doctor had no need to ask CC questions, but should have merely conducted a physical examination. We find such a proposal absurd. Information as to what happened will determine whether additional testing, such as for venereal diseases, is necessary. The fact that the doctor was aware of the child's admissions to a teacher does not change the need to confirm the statement. In fact, this hearsay exception is grounded on the belief that individuals are honest when seeking medical treatment. Therefore, the medical personnel should confirm the prior statements to ensure the person is providing truthful information.

Finally, appellant argues that the statements are not admissible because there was not a sufficient showing that CC was unavailable to testify at trial. The medical exception to the hearsay rule does not require that the declarant be unavailable. Mil.R.Evid. 803(4). As a "firmly rooted" exception to the hearsay rule, the medical exception inherently provides guarantees of trustworthiness which satisfy the Confrontation Clause of the Sixth Amendment. United States v. Clark, 35 M.J. 98, 105 (C.M.A. 1992). Appellant's argument is without merit. There was no violation of the Confrontation Clause. The military judge did not abuse his discretion in admitting this evidence.

VOLUNTARINESS OF APPELLANT'S STATEMENTS

On 8 December 1992 at about 1630, appellant's first sergeant, MSgt Auld, contacted appellant at home and told him to report with his daughter to the base hospital. At the hospital, Dr. Hickey conducted a medical examination. The local Child Protective Services (CPS) caseworker told appellant that CC could not go home with him and appellant made arrangements for CC's care.

Following a stop for supper, appellant arrived at the AFOSI office about 1910. Appellant waived his Article 31 rights and the AFOSI agents then questioned appellant for several hours. Appellant discussed how he bathed and powdered his daughter but denied putting his finger in her. About 2300 hours, appellant agreed to make a written statement. Following completion of the statement shortly after midnight, appellant consented to a search of his house. The search was completed about 0200 on December 9th and appellant unsuccessfully tried to sleep. Appellant went to work that day at 0630.

Around 1100, the AFOSI again called him in for additional questioning. A civilian officer assisted in this interview. Appellant again waived his rights. The civilian officer sat directly facing appellant. Occasionally, their knees touched or the civilian officer placed his hand on appellant's arm or shoulder in what he later described as a comforting gesture. Several hours later, appellant admitted to digitally penetrating CC's vagina and provided a written statement.

Appellant urges that his statements were involuntary based on a combination of factors. He cites his lack of sleep and acute tiredness, his anxiety over his daughter being removed from his home, the threats of the civilian officer to take him to jail if he didn't cooperate, and the proximity of the civilian officer when questioning him.

We review the voluntariness of an appellant's statements under a de novo standard of review. United States v. Collier, 36 M.J. 501, 504 (A.F.C.M.R. 1992), pet. denied 38 M.J. 461 (C.M.A. 1993). The totality of the circumstances determines the voluntariness of appellant's statements. Mil.R.Evid. 304(a), United States v. Byers, 26 M.J. 132 (C.M.A. 1988). The burden is on the government to establish that the statements were voluntary. Mil.R.Evid. 304(f).

The investigatory agents testified that they never threatened appellant, offered him frequent breaks, and did not observe any acute tiredness. Appellant testified that he understood his rights although he never stopped the interviews when he was tired because he thought he had to be there. The AFOSI agents further indicated that he actively participated in drafting the statements. Although appellant claims he did not read the statements, the second document shows cross-outs and substitutions made by appellant.

The military judge made extensive findings of fact which we adopt as our own. The length of the interviews, particularly during normal resting hours, and appellant's apparent tiredness are but two of the factors we consider in determining the voluntariness of the statements. We also considered that appellant had about 12 years on active duty at the time of the interviews, was oriented as to what was happening, recalled the circumstances of the interviews, and participated in the revisions on the statements. We find that there was no evidence of coercion, unlawful influence or inducement and that the statements were voluntary. Article 66(c), UCMJ.

STATE OF MIND EVIDENCE

Trial defense counsel proffered the testimony of Carrie Carpenter, a CPS caseworker, to discuss appellant's state of mind on December 10th when he told her he did not remember what he had told the AFOSI. The military judge admitted the evidence over trial counsel's relevancy objection. During cross-examination, trial counsel sought to introduce evidence of the witness' previous contact with appellant during an earlier inquiry. Defense counsel objected arguing the evidence was outside the scope of direct. However, the military judge allowed the questioning because it helped explain appellant's state of mind on December 10th. The

military judge excluded some evidence but allowed the witness to testify as to appellant's reluctance to talk with her and his denial of abuse.

Appellant now alleges that admission of this evidence was error. He argues that the implications that there was a separate incident of misconduct and that appellant was reluctant to talk with the caseworker are unfairly prejudicial.

We review the military judge's decision to admit evidence under an abuse of discretion standard. United States v. Spata, 34 M.J. 284 (C.M.A. 1992). We believe that portions of the testimony concerning appellant's contact with Ms. Carpenter were admissible as relevant to his later state of mind. We do not believe the members were misled into thinking there was another uncharged offense. While the testimony concerning appellant's reluctance to talk to the CPS caseworker is not as clearly relevant and could be interpreted as reflecting a consciousness of guilt, the military judge did not abuse his discretion in admitting this testimony. Here, the military judge balanced the prejudicial impact of the testimony and limited the overall questioning. Furthermore, the testimony concerning appellant's prior contacts with Ms. Carpenter was not unfairly prejudicial under the facts of this case where appellant's written AFOSI statement admitted that he became sexually aroused when he digitally penetrated his daughter's vagina. Article 59a, UCMJ. See United States v. Walker, 42 M.J. 67 (C.A.A.F. 1995).

TRIAL COUNSEL'S STATEMENTS DURING ARGUMENTS

Trial counsel made extremely aggressive arguments during findings and sentencing and, at one point, theatrically tore up copies of defense evidence. There were no objections to his comments. Appellant now asserts the military judge committed plain error in failing to stop trial counsel's highly inflammatory and often misleading argument.

Absent plain error, objections based upon improper argument are waived unless made at trial. United States v. White, 36 M.J. 306 (C.M.A. 1993). Plain error must be both obvious and so substantial as to have had an unfair prejudicial impact on the appellant. United States v. Fisher, 21 M.J. 327 (C.M.A. 1986). Defense counsel's failure to object is some evidence that he considered the statements to be of little consequence. United States v. Grandy, 11 M.J. 270, 275 (C.M.A. 1981).

Trial counsel's findings and rebuttal arguments were designed to appeal to the emotions, mischaracterized the evidence by stating that the accused was masturbating while he was touching his daughter, and occasionally exceeded the limits of reasonable comment on the evidence by stating that he "screwed with" his daughter. An argument with emotional overtones or one that appeals to the member's sense of outrage is not automatically improper. United States v. Williams, 23 M.J. 776, 778 (A.C.M.R. 1987), pet. denied, 25 M.J. 209 (C.M.A. 1987). However, in this case, counsel exceeded the proper limits more than one time. Additionally, statements such as "And if you buy this story about I couldn't see because I didn't have my glasses, I've got some land for you down on Long Island Sound" are clearly inappropriate. Rules of Professional Responsibility and USAF Standards for the Administration of Criminal Justice, The Prosecution Function, Standard 3–5.8(b) (TJAG Policy Number 26, 1 July 1994). However, rather than focusing solely on counsel's alleged inflammatory statements, we must consider the entire argument. We have also considered the fact that this was a hard fought trial in which both defense counsel and the military judge played active roles, yet neither objected to trial counsel's statements.

While concerned about the overly aggressive nature of counsel's comments, nonetheless, taken as a whole, counsel's

argument was not so clearly inappropriate as to require the military judge to intervene. Furthermore, members convicted appellant only of the offense of indecent acts with his daughter which he had described in his written statement to the AFOSI and acquitted him of the offense involving the other child. Therefore, even if we were to determine that counsel's argument was inappropriate and required intervention, we find no prejudice or plain error during the findings portion of trial. Article 59a, UCMJ.

Trial counsel's sentencing argument also exhibited the same pattern of misstatements and overstepping the bounds of appropriate comment on the evidence. However, trial defense counsel capably refocused the member's attention on the appellant and not the victim. Additionally, on several different occasions, the military judge intervened correcting misstatements of the law and the evidence (indicating that there was no evidence to show appellant was masturbating while he was touching his daughter). The military judge did not commit plain error in failing to further limit trial counsel's sentencing argument. We also find that the combination of the two arguments did not unfairly prejudice the appellant. Article 59a, UCMJ.

REMAINING ASSIGNMENTS OF ERROR

The evidence is factually and legally sufficient to support the finding of guilty. United States v. Turner, 25 M.J. 324, 324-5 (C.M.A. 1987). However, in light of appellant's general good character, as well as the limited scope and duration of the abuse, we find the approved sentence is inappropriately severe. Therefore, we approve only so much of the sentence as provides for a bad conduct discharge, confinement for four years, and reduction to E-1. United States v. Healy, 26 M.J. 394, 395-6 (C.M.A. 1988); United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982).

We conclude the findings and sentence, as modified, are correct in law and fact, the modified sentence is appropriate, and no error prejudicial to appellant's substantial rights occurred. Accordingly, the findings of guilty and the modified sentence are AFFIRMED.

Chief Judge DIXON and Judge STARR concur.

OFFICIAL

ALVIN J. STRIBLING Technical Sergeant, USAF Chief Court Administrator